UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES AND WORLDWIDE FLIGHT SERVICES, INC., JOINT EMPLOYERS;

OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES AND TOTAL FACILITY MAINTENANCE, INC., JOINT EMPLOYERS; AND

OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES AND TWIN STAFFING, INC., JOINT EMPLOYERS

and **Case 13-CA-115933**

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399, AFL-CIO

TRANSPORTATION WORKERS UNION OF AMERICA - LOCAL 504, AFL-CIO (OXFORD ELECTRONICS, INC. D/B/A OXFORD AIRPORT TECHNICAL SERVICES, WORLDWIDE FLIGHT SERVICES, INC., TOTAL FACILITY MAINTENANCE, INC., AND TWIN STAFFING, INC.)

and

Case 13-CB-115935

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENT'S EXCEPTIONS

Respectfully submitted:

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I. INTRODUCTION

In the instant case, Administrative Law Judge Kimberly Sorg-Graves properly concluded in her decision, dated May 31, 2017, that Oxford Electronics, Inc. d/b/a Oxford Airport Technical Services (Oxford) was a joint employer with the following three companies, whose employees began to perform work at Terminal 5 (T5) in Chicago's O'Hare International Airport on July 1, 2013: Worldwide Flight Services, Inc. (Worldwide), Total Facility Maintenance, Inc. (Total), and Twin Staffing, Inc. (Twin).[1] She likewise appropriately concluded that all four companies were subject to the National Labor Relations Act rather than the Railway Labor Act. In reaching this conclusion, she correctly found that none of the Respondent-Employers were in fact air carriers. Equally important, she found that the Respondent-Employers were unable to meet the National Mediation Board's (NMB) two part test and establish they are what is commonly referred to as a "derivate carrier." In other words, Respondents failed to show that: (1) the functions performed by the employees are among those traditionally performed by air carrier employees; and (2) an air carrier exercises significant control over Respondent-Employers' labor relations.

After finding that the Board had jurisdiction in this case, the ALJ properly concluded that the Respondent-Employers were successors to ABM Facility Services, Inc. (ABM)—who had previously held the service contract at T5 and employed the unit employees—and committed numerous violations of the Act. She specifically found that Respondent-Employers violated Section 8(a)(1) of the Act by conditioning the unit employees' employment on them signing

[1] The National Labor Relations Act will hereinafter be referred to as the "Act"; the National Labor Relations Board hereinafter is the "Board"; the Administrative Law Judge hereinafter is the "ALJ"; Oxford, Worldwide, Total, and Twin collectively hereinafter are "Respondent-Employers". Citations to the ALJ's decision are hereinafter referred to as "ALJD__"; the General Counsel's Exhibits are hereinafter referred to as "GC__"; Charging Party's Exhibits are hereinafter referred to as "CP__"; Respondent Oxford's Exhibits are hereinafter referred to as "R__"; Joint Exhibits are hereinafter referred to as "J__"; and the citations to the transcript are hereinafter referred to as "Tr. __".

membership cards and dues check-off authorizations for Transport Workers Union of America, Local 504 (Local 504). She further found that Respondent-Employers violated Section 8(a)(1), (2), and (3) of the Act by granting unlawful assistance to and recognizing Local 504 at a time when it did not represent an uncoerced majority of the unit employees, and then applying the terms and conditions of employment of the Local 504 contract, including its union-security provisions, to all the unit employees. In addition, she found that they violated Section 8(a)(1) and (5) of the Act by: (1) refusing to recognize and bargain with the unit employees' long-standing collective bargaining representative—International Union of Operating Engineers Local 399 (Local 399); and (2) making unilateral changes to unit employees' terms and conditions of employment when it applied the Local 504 contract which provided for wages and benefits that were much worse than those that they had enjoyed for many years while represented by Local 399. While the ALJ acknowledged that a *Burns* successor is normally free to set initial terms and conditions of employment, she properly concluded that Respondent-Employers forfeited that right here by unlawfully stating to employees that they would no longer be represented by Local 399 and would instead have to join Local 504. Consistent with her finding of the 8(a)(2) and (3) violations, the ALJ also concluded that Local 504 violated Sections 8(b)(1)(A) and (2) of the Act by: (1) accepting assistance and recognition from Respondent-Employers; and (2) agreeing to the application of the Local 504 contract, including its union-security provisions, to the unit employees.

In sum, the ALJ correctly found that the totality of the evidence demonstrates that Respondent-Employers engaged in a wide range of unlawful behavior in order to evade their bargaining obligations with Local 399 and to avoid having to continue to provide unit employees with the significantly better wages and benefits that they had enjoyed for many years. Local 504

likewise committed numerous unfair labor practices by seeking to benefit from Respondent-Employers' unlawful assistance and recognition. Based on the fact that the evidence clearly establishes that Respondent-Employers violated Section 8(a)(1), (2), (3), and (5) of the Act and that Local 504 violated Section 8(b)(1)(A) and (2) of the Act as described above, the General Counsel respectfully requests that Respondents' Exceptions be rejected in their entirety.

II. FACTS[2]

A. The Nature of the Work that is Performed by Mechanics, Helpers, Dispatchers, and Encoders at Terminal 5 in Chicago's O'Hare Airport.

Since about 1993, CICA Terminal Equipment Corporation (CICA TEC) has overseen T5 of Chicago's O'Hare Airport, which is where international flights arrive and depart.[3] ALJD p. 5, lines 14-18; Tr. 419. In order to provide for the operation of this terminal, it has awarded service contracts to various companies over the past 24 or so years. ALJD p. 5, lines 27-28. These companies, in turn, have employed mechanics, helpers, dispatchers, and encoders who have been responsible for operating, maintaining, and repairing T-5's baggage conveyor and sorting system, jet ways, and electrical, water, and pre-conditioned air systems that are associated with each jet way. ALJD p. 5, lines 28-30. The parties do not dispute that these employees perform work that is traditionally performed by airline employees and the ALJ found this to be the case in her decision. ALJD p. 18, line 38-39.

[2] Respondents except to many of the factual findings of the ALJ and have filed lengthy briefs in support of those exceptions. However, nothing contained in Respondents' exceptions or supporting briefs detract from the ALJ's factual findings as shown in this fact section with appropriate citations to the record.

[3] CICA TEC is a consortium that consists of all 27 or 28 airlines that utilize T5. Tr. 419-21. However, Keith Dalia (Oxford's Chief Operating Officer) admitted that CICA TEC is not an actual airline. Tr. 482.

B. Between the Early 1990's and June 30, 2013, Local 399 Was the Exclusive Collective-Bargaining Representative for the Mechanics, Helpers, Dispatchers, and Encoders Employed at Terminal 5 in Chicago's O'Hare Airport.

In the early 1990's, Local 399[4] became the exclusive collective-bargaining representative for the mechanics, helpers, dispatchers, and encoders who were employed at T5. Tr. 38-39. As has been previously mentioned, CICA TEC periodically awarded the service contract, by which these employees were employed at T5, to different companies. However, Local 399 continued to represent the unit employees through June 30, 2013, and had a series of collective-bargaining agreements with these various companies. ALJD p. 6, lines 3-11; Tr. 39-40, 120, 194, 255-56.

Most recently, Local 399 had a collective-bargaining agreement with ABM that was effective from October 1, 2011, to September 30, 2014. ALJD p. 6, lines 3-7; GC 2; Tr. 40-41, 120, 256, 377. The ALJ correctly found that this contract covered not only the mechanics, helpers, and dispatchers employed by ABM at that time, but also the encoders that had been employed by Total since August 2009.[5] ALJD p. 6, lines 7-11; GC 2 (Section 6) Tr. 42, 107-10, 180-81, 191-92. Indeed, Total admittedly agreed to abide by the ABM contract immediately after it went into effect. GC 2; Tr. 42, 107-10, 180-81, 191-92, 326-27.

[4] As the ALJ properly concluded, Local 399 is a labor organization within the meaning of Section 2(5) of the Act. ALJD p. 5, lines 7-11. In fact, its Business Representative Roger McGinty testified, without contradiction, that Local 399: (1) exists for the purpose of dealing with employers concerning wages, hours and other terms and conditions of employment for its members; (2) negotiates collective bargaining agreements for its members; and (3) files and processes grievances for its members. Tr. 37-38, 62-63. He likewise testified that Local 399's members: (1) participate in contract negotiations and grievance processing; (2) attend union meetings; and (3) vote for union officers in internal union elections. Tr. 38; See also CP 1.

[5] On August 2, 2009, Linc Facility Services, LLC (who had been awarded the T5 service contract) subcontracted all of the encoder work to Total. CP 3; Tr. 191, 324, 337-38, 379. At that time, Linc also had a collective-bargaining agreement with Local 399 which Total agreed to abide by when its employees began performing the encoder work. CP 2; Tr. 325. In addition, Total began to deduct union dues from its encoders' paychecks and remit them to Local 399. Tr. 326. Thereafter, on September 1, 2011, Linc merged with ABM and the latter then agreed to a successor contract with Local 399. GC 2, CP 7; Tr. 326-27, 379-80.

C. On September 7, 2012, CICA TEC Awarded the T5 Service Contract to Oxford, Who, in Turn, Subcontracted the Work to Worldwide, Total, and Twin. Thereafter, Respondent-Employers Refused to Recognize and Bargain with Local 399 and Instead Recognized Local 504 as the Unit Employees' New Collective-Bargaining Representative.

In the Fall of 2012, shortly after CICA TEC had awarded the service contract to Oxford on September 7, unit employees began to report to Local 399 Business Representative McGinty that they were hearing rumors that ABM was going to lose the service contract at T5 and that Local 399 was no longer going to be their collective-bargaining representative. Tr. 54. While he attempted to reassure the employees that they would continue to be represented by Local 399 as they had always been for the past two decades, in early October, these rumors were confirmed during meetings that Oxford and Worldwide representatives had with the mechanics, helpers, and dispatchers at the Hilton hotel located at O'Hare airport. ALJD p. 9, line to p. 10, line 6; Tr. 55, 121, 125, 257, 549-50.

In these meetings, Jay Rossi (Oxford' s Vice President), Robert Jensen (Oxford's Operations Manager at T5), Dave Cunningham (Worldwide's Vice-President of Labor Relations), and an unknown Local 504 representative met with the mechanics, helpers, and dispatchers on all the shifts. ALJD p. 9, lines 33-35; Tr. 121-22, 125, 258, 280, 501, 549-50. Rossi explained to the employees that Oxford had been awarded the service contract to perform the work at T5. ALJD p. 9, lines 37-39; Tr. 122, 260, 502. He also expressed Oxford's desire to retain them and invited them to complete the employment applications that were made available at this meeting. ALJD p. 9, line 39 and p. 10 lines 4-6; Tr. 123, 259, 470-71, 502-04. More

importantly, the ALJ correctly found that he revealed to the unit employees that Local 504[6] would be their new bargaining representative and that the terms of an existing contract between that union and Worldwide would be applied to them. ALJD p. 9, line 39 to p. 10, line 5; Tr. 124, 502, 504, 549-50.

On October 15, 2012, after unit employees apprised him of what had occurred at these meetings, McGinty called Cunningham and notified him that Local 399 currently represented the employees at T5. ALJD p. 10, lines 7-8 and p. 26, lines 30-34; Tr. 55-56. Significantly, McGinty also demanded that Oxford and Worldwide bargain a new contract with Local 399 that would go into effect when it took over the operations at T5. ALJD p. 10, lines 7-8 and p. 26, lines 30-34; Tr. 56-57. However, Cunningham immediately rejected Local 399's demand to bargain and stated that the unit employee' collective-bargaining representative was "out of luck." ALJD p. 10, lines 8-10 and p. 26, lines 34-35; Tr. 57.

Later that same day, Cunningham sent a follow-up email to McGinty to further impress upon him that Oxford and Worldwide were refusing to bargain with Local 399. ALJD p. 10, lines 10-11 and p. 26, lines 34-35; GC 4; Tr. 58-59. In his email, Cunningham initially confirmed that CICA TEC had indeed awarded the T5 service contract to Oxford and that it was scheduled to go into effect on January 1, 2013. GC 4. He also admitted that Oxford had subcontracted the work performed by the mechanics and dispatchers to Worldwide. GC 4. However, he then asserted that Worldwide was subject to the Railway Labor Act and that its

[6] As the ALJ properly concluded, Local 504 is a labor organization within the meaning of Section 2(5) of the Act. ALJD p. 5, lines 7-11. At the trial, Local 504 stipulated that, at all material times, it has: (1) existed, at least in part, for the purpose of dealing with employers concerning wages, hours, and terms and conditions of employment for its members; and (2) negotiated collective bargaining agreements and processed grievances for its members. J 4 (pp. 8-9). Local 504 further stipulated that its members have participated in the union by assisting with contract negotiations and grievance processing, attending union meetings, and voting for union officers in internal union elections. J 4 (p. 9).

employees would be represented by Local 504 because it had previously entered into a national contract with that union.[7] GC 4.

In January 2013, Oxford/Worldwide did not actually commence operations at T5 as had originally been contemplated. ALJD p. 10, line 13. This was apparently due to the fact that a Chicago alderman had objected to the unit employees being required to join Local 504. ALJD p. 10, lines 13-14; Tr. 453-54, 488. In spite of this delay, Oxford continued to prepare to take over the operations at some point in the near future. In fact, in early March 2013 it subcontracted the encoder work to Total and Twin.[8] GC 13 and 14; Tr. 293, 327, 351, 418.

As the ALJ correctly found, around this time, Rossi also met with Jimmie Daniels (Total's President) and informed him that Total's encoders—who were all going to be retained—would have to join Local 504. Tr. 327-28, 340-41. Equally important, Rossi dictated to Daniels the wages, benefits, and other terms and conditions of employment that it would have to provide to all of the encoders once Oxford and Worldwide took over the operations at T5 (i.e. those contained in the Local 504 contract). ALJD p. 11, lines 3-4 and p. 23, lines 20-22; Tr. 329. On March 18, Cunningham followed up by sending Daniels two copies of the Local 504 contract, along with a letter stating Total would be required to reduce the pay of its encoders to $13 per hour. GC 15; Tr. 330-32. To insure that Total abided by the Local 504 contract, Cunningham also arranged a conference call between Total and Local 504. GC 15; Tr. 332. In that call, he once again reiterated to Daniels that his company would be required to pay the Local 504 wages and benefits to the encoders. Tr. 332.

[7] As it was unmistakably clear that Oxford/Worldwide would not recognize and bargain with Local 399, McGinty did not have any further communication with Cunningham. ALJD p. 10, lines 11-12; Tr. 60. Local 399 instead filed charges, in Cases 13-CA-99518 and 13-CB-99519, against Oxford/CICA TEC and Local 504, respectively. ALJD p. 36, lines 36-37; GC 5 and 6; Tr. 60-61. However, these charges were ultimately dismissed by the Regional Director of Region 13 because they were found to be premature since Oxford/Worldwide had not yet taken over the operations at T5. ALJD p. 36, lines 36-37; RO 7 and 8; Tr. 61-62.

[8] A portion of the encoder work was subcontracted to Twin because of a requirement that 4.5% of the work be performed by a Woman Business Enterprise (WBE). RO 10; Tr. 328, 487, 496-97.

In about June 2013, Rossi likewise met with Taunesha Carpenter (Twin's President) and informed her that she would be hiring six encoders that were currently employed by Total after Oxford/Worldwide took over the operations. ALJD p. 23, lines 26-29; Tr. 352-53. Twin was not free to hire other individuals to perform the encoder work that had been subcontracted to it. Tr. 353. Rossi also dictated to her the wages, benefits, and other terms and conditions of employment that it would have to provide to the encoders—again, those contained in the Local 504 contract. ALJD p. 11, lines 3-4 and p. 23, lines 20-22; Tr. 353-54.

As the ALJ found, by June 2013, Oxford/Worldwide had hired a majority of the mechanics, helpers, and dispatchers who had previously been employed by ABM, despite the fact that these unit employees had been offered a wage rate that was significantly lower than their current rate of pay. ALJD p. 10, lines 21-24, p. 24, lines 30-32, and p. 25, lines 9-11; J 2, 3, 4 (p. 3); Tr. 126, 139-41, 263-68. In that same month, about June 28, both Total and Twin signed "me too" agreements with Local 504 wherein they formally agreed to abide by the latter's contract with Worldwide. ALJD p. 11, lines 4-6 and p. 23, lines 22-25; GC 15 and 16; Tr. 332-33, 354-55.[9]

D. On July 1, 2013, Oxford and Worldwide Took Over the Operations at T5 and All the Respondent-Employers Admittedly Began to Apply the Terms of the Local 504 Contract to the Mechanics, Helpers, Dispatchers, and Encoders.

1. As of July 1, 2013, a Majority of Respondent-Employers Workforce Was Comprised of the Unit Employees that Were Previously Working at T5, Without Any Changes to the Operations.

On July 1, 2013, Oxford/Worldwide finally took over the operations at T5. CP 11; Tr. 131, 196, 291-92, 333, 387, 418. The ALJ found that it was undisputed that, as of this date, a

[9] Based on the undisputed evidence, the ALJ correctly found that Total and Twin never entered into any type of contract negotiations with Local 504 and instead simply applied the latter's contract to its encoders as mandated by Oxford/Worldwide. ALJD p. 11, lines 4-6; Tr. 333, 355.

majority of the mechanics, helpers, and dispatchers Worldwide employed had previously been employed by ABM. ALJD p. 10, lines 21-24 and p. 24, lines 30-32; GC 1(o) (par. 9(c)), J 2, 3, 4 (p. 3). She further found that these unit employees also continued to perform the same job duties and utilize the same equipment as they had done when employed by ABM. ALJD p. 24, line 44 to p. 25, line 9; Tr. 133, 274, 278-79. In addition, they were supervised by George Farmer (Oxford supervisor), who had previously been employed as a foreman by ABM. Tr. 134, 149-50, 264, 274. ALJD p. 25, lines 5-7. Farmer, in turn, was supervised by Jensen—who also oversaw the work of these unit employees. ALJD p. 25, lines 5-6; Tr. 134, 274.

In the same vein, the ALJ found that Total retained all of the encoders that it had previously employed at T5 and they continued to perform the same encoder services as before without interruption or changes for about the next month. ALJD p. 10, lines 33-35 and p. 25, lines 13-15; GC 1(o) (par. IX(c)); Tr. 196, 333-34. But in August 2013, 6 of the 14 encoders who were employed by Total began to work for Twin. ALJD p. 25, lines 15-16; Tr. 196-201, 333-34, 357. More specifically, the encoders who worked under Lead Encoder Dessie Martin remained employed by Total and the encoders who worked under Lead Encoder Christina Sobiees began working for Twin at that time. ALJD p. 10, line 35 to p. 11, line 25 and p. 25, lines 5-6; Tr. 196-201. All the encoders, however, continued to perform the exact same job duties and utilize the same software and equipment that they had used prior to Oxford/ Worldwide taking over the contract. ALJD p. 25, lines 17-20; Tr. 201, 354-56. Because Total and Twin did not have any on-site supervisors at T5, the encoders were also supervised by Jensen. ALJD p. 13, lines 13-14 and p. 25, lines 21-22; Tr. 202, 293, 364-66.

2. On July 1, 2013, Respondent-Employers Admittedly Began to Apply the Terms of the Local 504 Contract to the Mechanics, Helpers, Dispatchers, and Encoders Working at T5.

Consistent with the Respondent-Employers' stipulations, the ALJ found that, beginning on July 1, 2013, all of them applied the terms of a collective-bargaining agreement between Worldwide and Local 504 to their respective unit employees who were employed at T5. ALJD p. 11, lines 17-20; J 4 (pp. 2, 4, 6); Tr. 455. This resulted in all of the mechanics, helpers, dispatchers, and encoders receiving lower wage rates than what they had been receiving under the Local 399 contract. ALJD p. 11, lines 20-22 and p. 28, lines 24-30; Compare GC 3 and J 1 (Article 4) Tr. 139-41, 215, 275-76. In the case of the mechanics, helpers and dispatchers, they were also now paid on a bi-weekly basis rather than a weekly basis.[10] ALJD p. 11, lines 20-25 and p. 28, lines 24-31; Tr. 143. Equally important, all of the unit employees were no longer eligible for any of the benefits set forth in the Local 399 contract. ALJD p. 11, lines 20-25 and p. 28, lines 24-38; Tr. 144-48, 216, 236. Rather, unit employees were required to make do with the inferior benefits provided by the Local 504 contract and they were initially not even eligible for some of these lesser benefits because they were treated as new employees. The table below shows the differences between the Local 399 benefits and the Local 504 benefits:

Benefit	Local 399 Contract	Local 504 Contract
Health insurance	Blue Cross Blue Shield PPO plan with no employee contribution. GC 2 (Section 16)	Health insurance plan with employee paying 40% of total cost to the company. J 2 (Article 29)
Pension plan	Defined benefit pension plan GC 2 (Section 15)	None

[10] The ALJ also correctly found that Worldwide categorized the mechanics into the following two job classifications for the first time: A mechanics (who were more experienced and had greater job responsibilities) and B mechanics (who were less experienced). ALJD p. 11, lines 20-22 and p. 28, lines 24-30; Tr. 132, 272-74. The B mechanics were paid a lower wage rate. Tr. 132.

401(k) plan	Local 399's 401(k) plan GC 2 (Section 20)	None
Vacation	1-4 years: 2 weeks vacation 5-16 years: 3 weeks vacation 17 years: 4 weeks vacation GC 2 (Section 12)	No vacation for first 6 months Less than 3 years: 1 week vacation[11] 3-4 years: 2 weeks vacation 5-9 years: 3 weeks vacation 10-14 years: 4 weeks vacation 15 years: 5 weeks vacation J 2 (Article 8); Tr. 146, 220, 276.
Holidays	Six holidays per year and as much as six additional personal days. GC 2 (Section 14)	No holidays for first 6 months. Six holidays per year (increasing eventually to 9 paid holidays). No personal days. J 2 (Article 7); Tr. 146-47, 220.
Overtime Pay	Double time and half for working a holiday. Lead mechanics had their overtime wages calculated using the Lead Mechanic's wage rate. GC 2 (Section 14); Tr. 141-43.	Time and half for working holiday. Lead mechanics had their overtime wages calculated using the A Mechanic's wage rate instead of the Lead Mechanic's wage rate. J 2 (Article 6(B)); Tr. 142-43.
Educational Training classes	Eligible to attend Local 399's Educational Training classes. GC 2 (Section 19)	None

3. Shortly Thereafter, Respondent-Employers Also Began to Enforce the Union Security Clause Contained in the Local 504 Contract.

Consistent with the Respondent-Employers' stipulations, the ALJ further found that Article 27 of the Local 504 contract contains a union security clause that provides, in pertinent part:

> All employees covered by this Agreement shall, as a condition of employment, maintain membership in [Local 504] so long as this Agreement remains in effect, to the extent of paying an initiation fee and membership dues (not including fines and penalties). An employee may have his/her membership dues deducted from his/her earnings by signing the form 'Assignment and Authorization for Check-

[11] In the case of Total and Twin's encoders, after they complained to Jensen about the drastic reduction to their vacation time, he granted them two weeks of vacation instead of the one week set forth in the contract. Tr. 231.

> Off of Union Dues,' as hereinafter set forth or, if no such authorization is in effect, s/he must pay her/his initiation fee and membership dues directly to [Local 504].

ALJD p. 29, lines 13-17; J 4 (pp. 2, 5, 7).[12] The Respondent-Employers further stipulated that, since about July 1, 2013, they deducted membership dues from unit employees' wages and remitted them to Local 504 in accordance with the terms set forth in Article 27.[13] ALJD p. 11, lines 8-11; J 4 (pp. 3, 5, 7). Finally, Total and Twin stipulated that, since about July 1, 2013, they conditioned employment on their respective encoders signing membership cards and dues checkoff forms for Local 504. ALJD p. 11, lines 6-8; J 4 (pp. 5, 7).

In accordance with these stipulations and admissions, mechanics Pernell Miller and Sheraney Ford both testified that Jensen required them to complete a Local 504 dues checkoff form as a condition of employment. In the case of Miller, he testified that as soon as he submitted his Worldwide application to Jensen, in June 2013, the latter handed him a dues checkoff form to complete. Tr. 126-28. Miller immediately responded that he did not want to be represented by Local 504 and repeatedly stated that he was not going to sign the form. Tr. 128-29. But Jensen coerced him into signing the form by telling him that he had to sign it if he wanted to work for Worldwide. GC 7; Tr. 129-30. In the case of Ford, she likewise testified that, sometime before July 1, Jensen told her that she would have to join Local 504. When she protested that she did not want to be in that union, he informed her that in order to work for Worldwide, she would have to join Local 504. Tr. 268-69. As a result, she was forced to sign a Local 504 dues checkoff form too. GC 18; 269-71. Thereafter, the two of them as well as the other mechanics, helpers, and dispatchers (who likewise had to sign dues checkoff forms) had dues deducted from their paychecks which were remitted to Local 504. Tr. 148.

[12] In its Answer to the Complaint, Local 504 admitted this fact as well. GC 1(n)(par. XV(a)(c), and (e)).
[13] In its Answer to the Complaint, Local 504 likewise admitted this fact. GC 1(n)(par. XIII(b)(c), and (d)).

Similarly, Martin testified that, in late November 2013, Total's supervisors, Kelly (last name unknown) and Tracey Ann Coakley, met with her and other encoders individually at their recode stations. Tr. 216-17. These supervisors also required the encoders to sign Local 504 dues checkoff forms as a condition of employment. GC 10; Tr. 217-19. In the same vein, Taunesha Carpenter (Twin's President) admitted that her company required all of its encoders to join Local 504 and sign dues checkoff forms as a condition of employment. Tr. 357. Thereafter, all the encoders began to have dues deducted from their paychecks and remitted to Local 504. Tr. 220, 223, 357. This continued until Local 504 ultimately disclaimed interest in representing the encoders employed by Total and Twin effective November 15, 2015. ALJD p. 11, lines 6-11 and p. 28, fn. 20; GC 11; Tr. 223-25, 334-35, 357-58.[14]

III. THE ALJ PROPERLY CONCLUDED THAT THE NATIONAL LABOR RELATIONS BOARD HAS JURISDICTION OVER RESPONDENT-EMPLOYERS (OXFORD/WORLDWIDE'S EXCEPTIONS 1-55, 79; TOTAL/TWIN'S EXCEPTIONS 3-10, 13-54; AND LOCAL 504'S EXCEPTIONS 2, 5-7, 9-19).

Under Section 2(2) of the Act, the definition of an "employer" does not include "any person subject to the Railway Labor Act." Instead, the RLA gives the NMB jurisdiction over common rail and air carriers. When an employer is found not to be a rail or air carrier engaged in transportation of freight or passengers, the NMB applies a two-part test to determine whether that employer is a "derivative carrier" that is still subject to the RLA. *Air Sew Corp.,* 39 NMB 450 (2012), *reconsideration denied* 39 NMB 477 (2012); *Talgo, Inc.,* 37 NMB 253 (2010); *Bradley Pacific Aviation, Inc.,* 34 NMB 119 (2007); *Gate Gourmet,* 34 NMB 97 (2007). In determining whether an employer is a "derivative carrier," the NMB considers: (1) whether the nature of the work is the type traditionally performed by employees of rail or air carriers; and (2)

[14] With respect to wages, benefits, and other terms and conditions of employment, Total and Twin continued to abide by the Local 504 contract even after the disclaimer of interest. ALJD p. 11, lines 11-13; GC 11; Tr. 225-26, 335, 358-59.

whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. Both parts of this test must be satisfied for the NMB to assert jurisdiction. *Id.*

To ascertain whether a carrier has control over a company, the NMB looks to six factors, including: (1) the extent of the carriers' control over the manner in which the company conducts its business; (2) access to company operations and records; (3) role in personnel decisions; (4) degree of supervision of the company's employees, (5) control over employee training; and (6) whether the employees in question are held out to the public as carrier employees. *Air Sew Corp.*, 39 NMB at 456; See also *Signature Flight Support/Aircraft Serv. Int'l., Inc.*, 32 NMB 30 (2004); *John Menzies PLC, d/b/a Ogden Ground Serv, Inc.*, 30 NMB 405 (2003); *Aeroground, Inc*., 28 NMB 510 (2001); *Miami Aircraft Support*, 21 NMB 78 (1993).

In the instant case, the Respondent-Employers are clearly not an air carrier. In fact, in *Worldwide Flight Services, Inc.*, 31 NMB 386, 393 (2004), the NMB specifically found that Worldwide is not an air carrier since it "does not fly aircraft and is no longer directly owned by an air carrier."[15] The NMB instead applied its two-part test in deciding that it was a "derivative carrier" as it relates to the company's operations at Building 9 of John F. Kennedy Airport, but only because there was evidence of significant air carrier control over the Kennedy Airport

[15] The NMB specifically found in its decision that, "[p]rior to 1999, AMR Services, Inc., a ground handling company for domestic and foreign flag carriers, was owned by AMR Corp., the holding company for American Airlines and American Eagle Airlines, carriers under the RLA. In early 1999, AMR Services was sold to Castle Harlan, Inc., which changed the name of the ground handling company to Worldwide. In September 2001, Worldwide was sold again to Vinci, a French company." See also Tr. 494, 603.

operations that is not present at O'Hare.[16] *Id*. at 393-94. Because Worldwide and the other Respondent-Employers are not air carriers, the only way that they can be found to be subject to the RLA is if their operations in T5 at O'Hare airport meet the NMB's two part test.[17] Although it is undisputed that the mechanics, helpers, dispatchers, and encoders employed at T5 perform work that is traditionally performed by employees of air carriers, the ALJ properly concluded that Respondent-Employers have failed to establish that CICA TEC has sufficient control over them to meet the second part of the NMB's "derivative carrier" test for the reasons set forth below. ALJD p. 18, line 36 to p. 22, line 28. Therefore, Respondent-Employers are indeed subject to the jurisdiction of the Board.[18]

A. CICA TEC Does Not Have Any More Control Over the Manner in Which Respondent-Employers Conduct Their Businesses than is Found in a Typical Subcontractor Relationship.

Contrary to Respondents' arguments, the ALJ correctly found that the Service Agreement provides CICA TEC with "no greater control over Respondent Employers than is found in a typical subcontracting relationship." ALJD p. 20, lines 27-30. In fact, Article 3.05 explicitly

[16] The elements of control that the NMB relied on in that case which are not present in the instant case, include: (1) Korean Air Lines (KAL) owned or leased the equipment used by Worldwide; (2) the carriers' schedules dictated Worldwide employee schedules; (3) KAL had to authorize and approve employee overtime; (4) KAL's and Air France's personnel directed and supervised Worldwide employees; (5) Worldwide's employees were trained by KAL; (6) KAL interviewed Worldwide's managers; (7) carrier personnel reported problems with Worldwide employees and those reports and requests resulted in discipline including reassignment and removal; (8) KAL requested employees be commended and those commendations were placed in Worldwide employee personnel files; and (9) KAL recommended and funded a pay raise for certain Worldwide employees. *Id*. at 394.

[17] As the ALJ noted, the NMB determines whether it has jurisdiction over contractors on an "operation and location" basis. See, e.*g.*, Huntleigh USA Corp.'s operations in Houston, *Huntleigh USA Corp.*, 40 NMB 130, 135 (2013), and St. Louis, *Huntleigh USA Corp.*, 14 NMB 149 (1987) found to be under the jurisdiction of the Act, but its operations in Oakland found to be under the jurisdiction of the RLA, *Huntleigh USA Corp.*, 29 NMB 121 (2001). ALJD p. 15, line 47 to p. 16, line 7 and p. 17, lines 4-23. Thus, the Board should reject Respondents' contention that the ALJ erred by not finding that the NMB's assertion of jurisdiction over Worldwide's employees employed at other airports (who have been found to meet the NMB's two part-test) is dispositive of the jurisdictional issue in this case.

[18] Contrary to Respondent's assertion, the ALJ properly relied on existing Board law, including *Allied Aviation Serv. Co. of New Jersey & Local 553, Int'l Bhd. of Teamsters, AFL–CIO*, 362 NLRB No. 173 (2015) and *ABM Onsite Servs.--W., Inc. & Int'l Ass'n of Machinist & Aerospace Workers, Dist. Lodge W24, Local Lodge 1005*, 362 NLRB No. 179 (2015), to conclude that there is no legal requirement that the Board obtain an advisory opinion from the NMB before asserting jurisdiction. ALJD p. 17, line 24 to p. 18, line 4.

states that "Contractor will at all times be *an independent contractor* with full and complete responsibility for all of its employees and representatives . . . All such Personnel providing services to CICA TEC will at all times be employees of the Contractor and *not* of CICA TEC." (emphasis supplied). ALJD p. 20, lines 34-38. Article 3.03 further states that "the Contractor will perform, or cause to be performed, all Services required of it under the terms and conditions of this Agreement with that degree of skill, care, and diligence normally exercised by contractors performing similar types of services in projects of a comparable scope and magnitude." ALJD p. 20, lines 23-25. Thus, the ALJ correctly found that these portions of the agreement do not support Respondent-Employers' contention that CICA TEC exercises meaningful control over them. ALJD p. 20, lines 27-30.

Based on uncontroverted testimony, the ALJ further found that the mechanics, helpers, dispatchers, and encoders' shifts are not dictated by CICA TEC or the airlines' schedules. ALJD p. 13, lines 26-29; Tr. 134, 202. As for the equipment serviced or used by the unit employees, it is undisputed that CICA TEC owns the conveyor belt system and jet bridges that the mechanics and helpers service. ALJD p. 19, lines 27-29; Tr. 307, 547. CICA TEC also owns a forklift that they sometimes use when performing their job duties. ALJD p. 20, lines 27-30; Tr. 547. On the other hand, Oxford owns a truck that the mechanics and helpers use to drive to jet bridges or to pick up equipment and deliveries. ALJD p. 20, lines 27-30; Tr. 133, 167, 274, 547. Oxford also provides them with certain tools that they need to use while performing their job duties. ALJD p. 20, lines 27-30; Tr. 284, 567-68. Not surprisingly, the ALJ viewed these facts as evidence that CICA TEC has only "some control" over Respondent-Employers which is clearly insufficient to meet the NMB's control test. ALJD p. 19, lines 24-30.

And while Respondent-Employers point to the fact that Article 3.02 states that CICA TEC's Executive Director has "the authority to manage, monitor and coordinate performance of the Contractor," this appears to vest him with nothing more than the right to take certain action to insure that their companies' fulfill their contractual obligations. This as well as other terms of the agreement are consequently insufficient to establish that CICA TEC has meaningful control over the manner in which the Respondent-Employers conduct their businesses. ALJD p. 20, line 27-30. In fact, in arriving at this conclusion, the ALJ correctly relied on *Airway Cleaners, LLC*, 41 NMB 262, 268 (2014) where the NMB declined to assert jurisdiction and specifically found that a more stringent service agreement[19] in that case:

> describes a typical relationship between a carrier and a contractor. The extent to which the carrier controls the manner in which Airway conducts its business is no greater than that found in a typical subcontractor relationship. As discussed in prior cases where the [NMB] has not found jurisdiction, a carrier must exercise "meaningful control over personnel decisions," and not just the type of control found in any contract for services, to establish RLA jurisdiction. See, e.g., *Bags, Inc*. 40 NMB 165, 170 (2013).

ALJD p. 21, line 18-46.

Equally important, is the inexplicable failure of the Respondent-Employers to call Jack Ranttila (CICA TEC's former Executive Director),[20] or his successor, to testify as to whether they exercised any control over the companies' work performance at T5. Indeed, an adverse inference should be drawn against the Respondent-Employers for failing to call Ranttila, or his

[19]The service agreement there, defined Airway as an independent contractor, but contained provisions that among other things: (1) permitted the airline to audit the contractor's business records; (2) provided that the airline would lease equipment to the contractor; (3) required the contractor to provide thirty days' notice to the airline prior to any staffing changes and prohibited any material change to the composition of its staff without the written consent of the airline's general manager; (4) required the contractor's employees to wear ID badges supplied by the airline or airport operator; and (5) granted the airline the right and option at any time and from time to time to interview and approve Station management and other employees of the contractor. *Airway Cleaners* at 265-66.

[20] In January 2016, Ranttila retired and was replaced by a group called AvirPros. Tr. 137-38, 514. While Chris DiFario assumed Ranttila's position, AvirPros is also comprised of the following individuals: (1) Operations Manager Joe Shirley; (2) two unknown duty managers; and (3) a finance manager. ALJD p. 12, lines 12-18; Tr. 514, 555-56.

successor, as a witness to testify about what, if any, control CICA TEC exercises over them—as it would be expected that these individuals would provide testimony that was favorable to their contractors if there was in fact meaningful control exercised.[21]

Based on the foregoing, the ALJ properly concluded that CICA TEC does not exercise meaningful control over the manner in which Respondent-Employers conduct their business—which is one factor showing that the NMB's control test has not been met in this case.

B. Respondent's Submission of After-the-Fact Reports to CICA TEC Fails to Establish Control Pursuant to NMB's Test

As the ALJ found, the Service Agreement requires Respondent Employers to submit various reports to CICA TEC. ALJD p. 20, lines 14-18. While Respondent-Employers assert that the submission of these reports to CICA TEC evinces significant control over them, they conveniently ignore the testimony of their own witness, Jensen, who severely undermined the importance of these reports. During Respondent's case-in-chief, Jensen testified that he would send daily reports to Ranttila to keep him apprised of the total number of bags that went through the system, bag jams that occurred, maintenance issues that arose with the equipment, accidents that happened, contractors that visited the terminal, and any deliveries made. RO 16-19; Tr. 523-28, 531. But on cross-examination, Jensen conceded that these reports were provided to Ranttila, *after the fact*, and were "just an FYI." Tr. 559-60. For example, RO 16 reflects an email, dated

[21] The Board has held that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact). Moreover, testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972).

July 8, 2013, that Jensen sent to Ranttila to simply inform him that a main line conveyor belt that had been damaged earlier that day was replaced by a mechanic (independently assigned to that job by Jensen). RO 16; Tr. 559-60. In the same vein, RO 18 are examples of daily reports completed by dispatchers that reflect things such as equipment out of service, contractor visits, accidents, and deliveries. RO 18; Tr. 561. These type of reports were forwarded to Ranttila (and now are forwarded to Joe Shirley) a day or two after they had been completed, and more importantly, after all of the matters contained therein had already been independently dealt with by Jensen. Tr. 562. Similarly, RO 19 are examples of daily reports that were provided to Ranttila (and now are provided to Shirley), after the fact, that simply show bag jams that occurred on that particular day and the mechanics who cleared them. RO 19; Tr. 564-65. In addition, Jensen provides Bridge Call logs to CICA TEC, which simply document issues with jet bridges that airlines reported to a dispatcher and which mechanic was assigned to repair the problem. RO 21 Tr. 535-38, 566-67. He also sends daily reports to the airlines notifying them if the conveyor belt system is down or a belt is broken. Tr. 523-24. However, the ALJ was correct in finding that the mere fact that Jensen provides the above reports to CICA TEC or the airlines is insufficient by itself to meet the NMB's control test.

C. CICA TEC Does Not Play a Significant Role in Respondent-Employers' Personnel Decisions

In a misguided effort to attack the ALJ's correct and important finding that CICA TEC does not play a significant role in Respondent-Employers' personnel decisions they resort to misstating and distorting the largely undisputed facts in this case. As the ALJ correctly found, Article 3.05 of the Service Agreement provides that "Contractor will . . . assign and maintain during the term of this Agreement an adequate staff of competent personnel who are fully equipped and qualified to perform the Services. Contractor will diligently seek-to replace any

departing Key Personnel, but Contractor will not replace 'Key Personnel' as specified in Exhibit [D] without the prior written consent of CICA TEC, which consent will not be unreasonably withheld." ALJD p.8, lines 21-31 and p. 20, lines 42-45. In turn, Exhibit D of the Service Agreement limits "Key Personnel" to only the: Facility Manager, Assistant Facility Manager, and Supervisors. ALJD p.8, lines 32-33.

At the trial, Keith Dalia (Oxford's Chief Operating Officer) testified that CICA TEC requested that he furnish a copy of Jensen's resume before Oxford took over the operations at T5—presumably because he was to be Oxford's Operations Manager (i.e. Facility Manager). ALJD p. 21, lines 2-3; RO 14; Tr. 456. There is no evidence in the record though as to what, if any, review of the resume was actually done by CICA TEC. ALJD p. 21, lines 2-3; Tr. 481. Nor does it appear that Jensen was ever interviewed by CICA TEC.[22] Tr. 481. And contrary to Oxford/Worldwide's claim in its brief,[23] there is no evidence that Oxford could not hire Jensen without CICA TEC's prior approval. If evidence did indeed exist to support this bare assertion, Oxford/Worldwide would obviously have introduced it at trial by simply having Ranttila and/or Jensen testify about the matter. However, having failed to do so, Oxford/Worldwide cannot now simply misstate the record in an attempt to prove that CICA TEC has control over its personnel decisions.

In the same way, Dalia and Jensen testified that Ranttila requested that Farmer (who had previously been ABM's foreman) be retained by Oxford. ALJD p. 21, lines 1-2; Tr. 461, 551. But as the ALJ correctly found, on cross-examination, Jensen admitted that this was merely a request, not a requirement. ALJD p. 21, lines 1-2; Tr. 551. Indeed, Dalia and Jensen both acknowledged that Farmer had to submit an employment application to Oxford, interview for a

[22] During the trial, Jensen did not testify that he was interviewed by CICA TEC or that it otherwise had any involvement in Oxford's decision to have him become the Operations Manager at T5.
[23] On page 2 of their brief, Total and Twin adopted Oxford/Worldwide's brief and the arguments contained therein.

job with Oxford officials, meet the company's qualifications, and pass a physical and drug test before it ultimately decided on its own to hire him. ALJD p. 21, lines 4-6; Tr. 478-80, 551-52. If Oxford had not viewed Farmer as qualified and/or he had not passed the physical and drug test, it would not have hired him. And on cross-examination, Jensen further admitted that it was Oxford who made the decision to hire Farmer to be its supervisor (as opposed to a foreman, mechanic, or some other position). Tr. 552. Thus, Oxford/Worldwide's claim that CICA TEC was directly involved in Oxford's decision to hire Farmer is a gross mischaracterization.

Not surprisingly, as the unit employees were not considered to be "Key Personnel," Dalia and Jensen likewise admitted that CICA TEC did not require Oxford and Worldwide to retain any of the existing unit employees at T5—contrary to the argument in Oxford/Worldwide's brief. ALJD p. 21, lines 2-3; Tr. 470, 550. In fact, the ALJ correctly found that Oxford and Worldwide required all of ABM's mechanics, helpers, and dispatchers to complete employment applications if they wished to be considered for hire. ALJD p. 10, lines 1-2; Tr. 471-72, 502-03, 550. The companies afterwards reviewed all the applications that were submitted, interviewed each of the applicants, and decided whether they were qualified and should be hired. ALJD p. 21, lines 6-9; Tr. 472, 509, 550-51. Oxford and Worldwide also required that all the applicants pass a physical and drug test before they would hire them. ALJD p. 10, lines 1-3; Tr. 472, 503, 550-51. And importantly, the applicants had to agree to join Local 504 and accept the lesser wages, benefits, and other terms and conditions of employment contained in the Local 504 contract. ALJD p. 10, lines 1-4; Tr. 474-75, 482. As a result, 6 out of the 19 ABM mechanics, helpers, and dispatchers chose to not even apply for employment. ALJD p. 10, lines 22-23; J 3; Tr. 476-77. In the end, 8 of the 21 employees that were employed as of July 1, 2013, were new hires (who likewise had to submit an employment application, come in for an interview, meet Oxford and Worldwide's

qualifications, and pass a physical and drug test) that Oxford and Worldwide hired, without any involvement by CICA TEC. ALJD p. 10, line 24; J 2; Tr. 476-77, 509.

In the case of the encoders, the ALJ likewise found that Total and Twin simply retained all 14 individuals who were already performing that work under the ABM subcontract. ALJD p. 10, lines 33-35 and p. 25, lines 13-16. There is again no evidence that CICA TEC had any involvement in the decision to retain them. ALJD p. 21, lines 6-9.

Furthermore, the record is devoid of any evidence whatsoever that CICA TEC has had any input in the Respondent-Employers subsequent hiring decisions or staffing levels.[24]

In the same vein, the ALJ found that Article 3.05 of the Service Agreement provides that "CICA TEC reserves the right to direct the Executive Director to remove any personnel from the performance of Services from any position upon material reason therefor given in writing." ALJD p. 20, lines 40-42. However, the Respondent-Employers admit and the ALJ correctly determined that CICA TEC has never once asked any of the Respondent-Employers to remove either a supervisor or employee during the past 3 ½ years that the agreement has been in effect. ALJD p. 21, lines 11-12. In addition, it should be noted that the NMB has previously held that a carrier's right to remove a contractor's employee is not of critical importance if the latter makes the "final decisions" on discipline and discharge. See *Bags,* 40 NMB 165, 169-70; *Huntleigh,* 40 NMB at 136-37.

Therefore as clearly set forth above, the ALJ properly concluded that evidence fails to establish that CICA TEC exercises a significant role in the Respondent-Employer's personnel decisions, including the hiring and firing of unit employees, which further underscores the fact that Respondent-Employers have failed to meet the NMB's control test. The mere fact that the

[24] At the trial, Jensen admitted that he (not CICA TEC) decides whether Total and Twin have adequate staffing levels. Tr. 310. There was also no testimony that CICA TEC has required Oxford and Worldwide to maintain certain staffing levels.

Service Agreement provides that "departing Key Personnel" will not be replaced without the prior consent of CICA TEC is insufficient to meet the control test as this provision is modified by the statement "which consent will not be unreasonably withheld." Indeed, it appears that CICA TEC, at most, "rubber stamped" Oxford's decision to hire Jensen and it (CICA TEC) admittedly also played no role in the decision to hire Farmer as a supervisor.

D. CICA TEC Does Not Supervise the Mechanics, Helpers, Dispatchers, or Encoders

As Respondent-Employers did in their failed attempt to show that CICA TEC plays a significant role over their personnel decisions, they misstate and distort the facts in an effort to establish that CICA TEC supervises their employees. In her decision, the ALJ correctly found that, since Oxford assumed the T5 service contract, the mechanics, helpers, and dispatchers have been supervised by Farmer and Jensen. ALJD p. 23, lines 9-12. The ALJ further found that since Total and Twin do not have any on-site supervisors at T5, the encoders have likewise been supervised by Jensen. ALJD p. 23, lines 29-43. In addition, it is undisputed that Lead Encoder Dessie Martin is responsible for assigning the encoders to one of the eight recode stations where they perform their job duties and she sets their break times. ALJD p. 13, lines 17-18; Tr. 190-91, 232.

Contrary to Respondent-Employer's assertion, the ALJ properly found that neither Ranttila nor any other CICA TEC representative has been responsible for supervising any of the unit employees since July 1, 2013. ALJD p. 12, lines 7 to p. 13, line 43 and p. 19, line 34 to p. 20, line 7 and p. 22, lines 1-2. In fact, Lead Mechanic Miller and Lead Encoder Martin both testified, without contradiction, that Ranttila (and his successor) has not had any involvement in determining unit employees' work schedules. ALJD p. 13, lines 26-29; Tr. 136, 208. Ranttila has also not assigned work to unit employees or transferred them from one job to another. Tr.

136-37, 209. Martin specifically testified that Ranttila had only spoken to her about a work-related issue, such as bags piling up, on about two occasions in 20 years.[25] ALJD p. 12, lines 27-29; Tr. 242-43. Ranttila (and his successor) likewise has not authorized any overtime. Tr. 208. Significantly, no CICA TEC representative has ever disciplined or terminated a unit employee, or recommended such action. ALJD p. 13, lines 9-11; Tr. 137, 209. In addition, CICA TEC has never provided evaluations to employees. ALJD p. 13, lines 9-11; Tr. 137, 209. It also has not promoted them or granted them a pay raise, or recommended such action. Tr. 137, 209. Nor has any CICA TEC representative ever adjusted any employee grievances or complaints. Tr. 137, 209.

Not surprisingly, even Jensen acknowledged that he (and Farmer) supervised the unit employees—as opposed to any CICA TEC representative. For example, Jensen testified that, Ranttila (before his retirement) would sometimes notify him of a possible maintenance issue in T5. ALJD p. 12, lines 18-20; Tr. 516-17. While Oxford/Worldwide mischaracterizes Jensen's testimony by asserting, in its brief, that Ranttila demanded that Jensen assign employees to a particular job assignment, this bald assertion is flatly contradicted by Jensen's own testimony. In fact, as Jensen admitted and the ALJ correctly found, it would be up to him (Jensen) to conduct his own independent investigation to determine whether there was in fact an issue that needed some attention. ALJD p. 12, lines 20-21; Tr. 554. If there was, Jensen would independently assign one of his mechanics to fix the problem. ALJD p. 12, lines 21-22; Tr. 554. He would also admittedly be responsible for supervising the work of the mechanics and disciplining them if they failed to perform it in a satisfactory manner. ALJD p. 12, lines 21-22; Tr. 544-55.

[25] In its brief, Oxford/Worldwide makes much ado about the fact that Martin testified to seeing Ranttila on an almost daily basis while working at T5. But what is conspicuously absent is any mention that she also testified that he had only spoken to her about a work-related issue twice in 20 years as noted above.

Since Ranttila retired a year ago, Joe Shirley has occasionally asked Jensen to have a mechanic replace a conveyor belt or perform a cleaning task. ALJD p. 12, lines 40-41; Tr. 556-57. But Jensen—contrary to Oxford/Worldwide's assertion— again admitted that whenever it was brought to his attention that a belt needed to be replaced, he still independently assigned a mechanic to perform the work. ALJD p. 12, lines 41-42; Tr. 558. Jensen would also supervise the mechanic's work and discipline the employee if the work was not performed properly. Tr. 558.

With respect to any cleaning tasks, Jensen will initially decide, on his own, whether any of his mechanics have time to perform the task. ALJD p. 12, lines 41-42; Tr. 556-58. If Jensen determines that a mechanic is available to perform the task, he decides who to assign the work to, supervises that work, and issues any discipline that may be necessary. Tr. 558. However, as the ALJ found, in some cases, Jensen has determined that the mechanics are too busy to perform a requested cleaning task and he has, on his own, made the decision to put off that work for weeks. ALJD p. 12, lines 41-43; Tr. 557-58.

Similarly, Jensen testified that airline employees will sometimes report a maintenance problem to him. Tr. 560. But he will conduct his own independent investigation to determine whether a problem does indeed exist. Tr. 560. If so, he again will decide on his own which mechanic to assign the work to and supervise the work (along with Farmer) to make sure it is performed correctly. Tr. 560-61.

Finally, although Jensen testified that CICA TEC maintains certain gate and bag room procedures that all T5 employees must follow (including unit employees), on cross-examination, he acknowledged that there is no evidence that these procedures have ever been distributed to them. ALJD p. 12, lines 7-12; RO 15; Tr. 520-21, 552-53. Indeed, there is no evidence that any

of the unit employees are even aware of the existence of the procedures or that they follow them. And with respect to the encoders, it is undisputed that both Total and Twin maintain their own company employee handbooks that their respective employees must abide by. ALJD p. 13, lines 44-45; GC 8 and 9; Tr. 209-11, 334, 356-58.

Therefore, it is clear that the ALJ properly concluded that CICA TEC does not supervise the mechanics, helpers, dispatchers, or encoders employed by the Respondent-Employer and this fact provides additional evidence that the NMB's control test has not been met.

E. CICA TEC Does Not Exert Any Control Over Training Provided to Mechanics, Helpers, Dispatchers, or Encoders.

As the ALJ correctly found, the evidence shows that when Oxford/Worldwide hire new mechanics they are trained exclusively by Oxford's lead mechanics.[26] ALJD p. 14, lines 9-10; Tr. 138. It is undisputed that CICA TEC does not provide the lead mechanics with any direction as to how to conduct this new employee training. ALJD p. 14, lines 9-10; Tr. 138. In the same way, the ALJ found that Total and Twin both rely on Lead Encoder Dessie Martin to train their new encoders. ALJD p. 14, lines 8-9; Tr. 190, 212-13. CICA TEC again does not provide her with any instruction on how to conduct this training. ALJD p. 14, lines 8-9; Tr. 212. In addition, the mechanics, helpers, and encoders receive annual safety training from an Oxford supervisor, Bob "Safety Bob" Dibaro. ALJD p. 14, lines 4-8; Tr. 138-39, 212-13, 308. Significantly, there is absolutely no evidence in the record that CICA TEC has ever provided any type of training to the mechanics, helpers, dispatchers, or encoders. ALJD p. 14, lines 4-11; Tr. 139, 213.

Thus, CICA TEC's undisputed failure to exercise any control over the training provided to the unit employees only further underscores the ALJ's conclusion that the NMB's control test has not been met.

[26] The record does not reveal who provides new employee training to the helpers and dispatchers. ALJD p. 14, lines 10-11.

F. The Mechanics, Helpers, Dispatchers, and Encoders Are Not Held Out to the Public as CICA TEC Employees.

Based on the undisputed record evidence, the ALJ found that mechanics, helpers, and dispatchers wear Worldwide uniforms at work as well as airport badges that identify them as Worldwide employees. ALJD p. 22, lines 12-13; Tr. 139, 277. The ALJ likewise found that the encoders employed by Total and Twin wear uniforms and airport badges that bear the name of their respective company on them. ALJD p. 22, lines 12-13; Tr. 213-14. These companies also complete the process that is necessary so that their respective employees will be issued airport badges. Tr. 214, 310. In addition, mechanics, helpers, and dispatchers receive their paychecks from Worldwide, whereas encoders receive their checks from Total or Twin. Tr. 143, 215, 279. Accordingly, there is no dispute that any of the unit employees are held out to the public as CICA TEC employees which is another factor that supports the ALJ's conclusion that the NMB's control test has not been met in this case.

In sum, in applying the NMB's two part test, the ALJ correctly found that Respondent-Employers have failed to establish that they are derivative carriers for all the reasons set forth in her decision and this section of the brief. The Respondent-Employers are consequently subject to the Board's jurisdiction as the ALJ properly concluded.

IV. THE ALJ PROPERLY CONCLUDED THAT OXFORD IS A JOINT EMPLOYER WITH TOTAL AND TWIN (OXFORD/WORLDWIDE'S EXCEPTIONS 56-65, 81; TOTAL/TWIN'S EXCEPTIONS 4, 23, 34-40, 44-45, 49-50; AND LOCAL 504'S EXCEPTION 20).

In *BFI Newby Island Recyclery,* 362 NLRB No. 186, slip op. at 15 (2015), the Board restated its joint employer test as follows:

> We return to the traditional test used by the Board (and endorsed by the Third Circuit in *[NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1123 (3d Cir. 1982)]): The Board may find that two or more entities are joint employers of a single work force if they are both employers within the

> meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may "share" control over terms and conditions of employment or "codetermine" them, as the Board and courts have done in the past.

The Board also made it clear that it would no longer require that a joint employer possess the authority to control employees' terms and conditions of employment and exercise that authority "directly, immediately, and not in a 'limited and routine' manner." *Id*. at 15-16. Rather, it is sufficient that the joint employer have authority to do so. And in determining whether such authority exists, the Board considers terms and conditions of employment such as hiring, firing, disciplining, supervising and directing employees as well as wages and hours. *Id*. at 18-20.

In the instant case, based on Oxford/Worldwide's stipulation and the record evidence, the ALJ properly concluded that they are joint employers of the mechanics, helpers, and dispatchers employed at T5. ALJD p. 23, lines 7-15; J 4 (p. 2). Contrary to Respondents' assertion, the ALJ was also correct in concluding that Oxford is a joint employer with both Total and Twin for the encoders employed at T5. ALJD p. 23, lines 4-6. Indeed, as the ALJ found, the evidence shows that "Oxford exercises control over almost every aspect of the essential terms and conditions of employment of the encoders employed by Total and Twin." ALJD p. 23, lines 17-19. Thus, despite the fact that Total and Twin unconvincingly argue in their brief that *BFI Newby Island Recyclery* was wrongly decided, the fact remains that the ALJ applied the correct joint employer test in the instant case—and the undisputed evidence here was so overwhelming that they would have been found joint employers under any standard.

As an initial matter, it bears noting that Oxford, after subcontracting the encoder work to Total and Twin, dictated to both these companies the wages, benefits, and other terms and conditions of employment that they would have to provide to their respective encoders. ALJD p.

23, lines 20-22. Both Daniels (Total's President) and Carpenter (Twin's President) candidly admitted, during 611(c) examination, that Oxford, by Rossi, required them to apply all of the terms of the Local 504 contract, including wages and benefits, to their encoders.[27] ALJD p. 23, lines 20-22. Daniels and Carpenter further testified that it was made abundantly clear to them that their companies were not free to deviate from these terms of employment and they did not attempt to negotiate different terms with Local 504. ALJD p. 23, lines 23-25. In addition, Carpenter admitted that Oxford dictated to her how many encoders she would initially employ (six) and who those individuals would be (the Total encoders who were currently working under Lead Encoder Christina Sobiees). ALJD p. 11, lines 1-2 and p. 23, lines 26-29. As with wages and benefits, Carpenter was not free to deviate from this directive and hire other individuals of her own choosing at that time.

Since Oxford took over the operations at T5 on July 1, 2013, Oxford has continued to exercise significant control over Total and Twin's encoders. Because Total and Twin do not have any on-site supervisors at T5, Jensen is responsible for supervising all the encoders as the ALJ correctly found. ALJD p. 23, lines 29-43. Jensen readily admitted that he will direct Total and Twin to hire encoders if he believes either company is understaffed. Tr. 310. The Lead Encoders will also notify him if an encoder calls in sick and they have been unable to find a replacement. ALJD p. 13, lines 18-19; Tr. 204. In these instances, Jensen will require an encoder to stay late and authorize them to work overtime. ALJD p. 13, lines 20-21 and p. 23, lines 34-36; Tr. 204, 312-13, 318-19. Similarly, the Lead Encoders will notify him if an encoder has to leave before the end of their shift and they have been unable to find a replacement. ALJD p. 13, lines 18-19; Tr. 204-05, 313. Jensen will then once again require an encoder to cover that

[27] In the case of Total, Daniels testified that Cunningham subsequently reiterated to him that his company would be required to pay the Local 504 wages and benefits to the encoders.

employee's shift and authorize any necessary overtime. ALJD p. 13, lines 20-21 and p. 23, lines 34-36; Tr. 204-05, 313-14. In the same way, he can and will transfer encoders from one recode station to another one if he determines that it is necessary in order to keep up with the work. Tr. 205-06, 294-95. He also assigns mechanics, helpers and dispatchers to assist the encoders with their job duties on a regular basis—especially in the summer months when it is not unusual for him to do so on a daily basis. ALJD p. 13, lines 23-24 and p. 23, lines 37-38; Tr. 206-07, 295. Significantly, it is undisputed that Jensen has authority to make all of these transfers and reassignments of work independently, without having to consult with any Total or Twin supervisor or manager. Tr. 295.

In addition, Jensen admittedly investigates any alleged misconduct committed by the encoders and will recommend the level of discipline that he believes is warranted to either Total or Twin, depending on who employs that individual. ALJD p. 13, lines 8-9 and p. 23, lines 4-44; Tr. 207, 296-97. For example, in Summer 2015, Jensen observed an encoder who was not doing their job properly and recommended that her employer issue her a written warning. ALJD p. 13, lines 5-7; Tr. 297-98. Not only was Jensen's recommendation to discipline this individual followed, but he even required Total and Twin to meet with him so he could show both of them the surveillance video and explain that this type of misconduct was unacceptable. ALJD p. 13, lines 5-7 and p. 23, lines 41-43; Tr. 298-99. In other instances, when he has observed encoders talking on their cell phones at work, he has independently ordered Lead Encoder Dessie Martin to notify them that they need to get of their phones so they can perform their job duties in an efficient manner. ALJD p. 23, lines 40-41; Tr. 299-300. He also admittedly has the authority to effectively recommend that an encoder be terminated and/or removed from their job at T5. Tr. 207, 301-02.

Finally, Jensen acknowledged that he has the authority to adjust encoders' grievances without consulting with Total or Twin. Tr. 317, 319-20. In fact, in the past, the encoders have brought grievances to his attention concerning their job duties and uniforms and he has been able to resolve them to their satisfaction. ALJD p. 23, lines 38-40; Tr. 315-17, 319-20.

Based on the foregoing, the ALJ properly concluded that Oxford is not only a joint employer with Worldwide as it relates to the mechanics, helpers, and dispatchers employed at T5, but it is also a joint employer with Total and Twin for the encoders employed at T5 given that the undisputed evidence is more than sufficient to meet the Board's test.[28]

V. THE ALJ PROPERLY CONCLUDED THAT THE RESPONDENT-EMPLOYERS ARE SUCCESSORS TO ABM FACILITY SERVICES, INC. (OXFORD/ WORLDWIDE'S EXCEPTIONS 66-75; TOTAL/TWIN'S EXCEPTIONS 5, 35-37, 40, 43; AND LOCAL 504'S EXCEPTIONS 21, 23-24).

The test for determining successorship under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), is well established:

> An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a "substantial and representative complement" in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a "substantial continuity" between the enterprises.

Hydrolines, Inc., 305 NLRB 416, 421 (1991)(quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43, 52 (1987); see also *Ready Mix USA, Inc.*, 340 NLRB 946, 946-947 (2003).

To determine whether there is "substantial continuity" between the two enterprises, the Board and courts look at the totality of the circumstances taking into account the following

[28] The ALJ correctly rejected Total and Twin's specious argument that the complaint allegations against them are barred by Section 10(b) of the Act, because their joint employer, Oxford, was served with timely filed charges. ALJD p. 27, fn. 19. Indeed, it is well-established that "the nature of the joint-employer relationship is such that the charge against [one joint employer] also constitute[s] a charge against [the other]." *Mar Del Plata Condominium*, 282 NLRB 1012, fn. 3 (1987); See also *Photo-Sonics*, 254 NLRB 567 (1981).

factors: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the entity has the same production process, produces the same product, and basically has the same body of customers. *Fall River* at 43. It is particularly relevant whether the employees "view their job situations as essentially unaltered." *Id.*, quoting *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 184 (1973).

The ALJ's conclusion that Respondent-Employers are successors to ABM Facility Services, Inc. is amply supported by both Respondents' admissions and the record. Thus, in the instant case, it is undisputed that, on September 7, 2012, CICA TEC awarded the T5 service contract to Oxford. RO 13. Shortly thereafter, Oxford subcontracted the work being performed by the mechanics, helpers, and dispatchers to Worldwide. The ALJ correctly found and both companies readily admit that, on July 1, 2013, they assumed the service contract that ABM had previously been performing, without any hiatus in the operations. ALJD p. 24, line 44 to p. 25, line 1; GC 1(o)(par. IX(a) and (b)). They further admit that, as of this date, a majority of their workforce in the bargaining unit were the mechanics, helpers, and dispatchers who had previously been employed by ABM. ALJD p. 24, lines 30-32 and 44-45. Equally important, the ALJ found that it was abundantly clear that there was "substantial continuity" between ABM and Oxford/Worldwide. ALJD p. 24, line 44 to p. 25, line 11. Indeed, both Oxford/Worldwide and its predecessor (ABM) were engaged in the business of maintaining and operating the baggage handling system at T5. Once Oxford/Worldwide took over the contract at T5, its unit employees also continued to do the exact same jobs, in the same airport terminal, utilizing the same methods and equipment as they had done while employed by ABM. ALJD p. 25, lines 1-5; Tr. 133, 274, 278-79. They also reported to Farmer, who had been their foreman when they worked for ABM.

ALJD p. 25, lines 5-7. In addition, Oxford/Worldwide and ABM provided services for the same customer: CICA TEC. ALJD p. 25, lines 1-4. Not surprisingly, after Oxford/Worldwide took over the T5 service contract, the mechanics, helpers, and dispatchers "view[ed] their job situations as essentially unaltered." ALJD p. 25, lines 4-5.

In the same vein, there is no dispute that Oxford subcontracted the work being performed by the encoders to Total and Twin. GC 13 and 14; Tr. 293, 327, 351, 418. The ALJ correctly found and Respondent-Employers readily admit that, on July 1, Total continued to perform all the encoder work at T5, without any interruption, and simply retained all the encoders it had previously employed. ALJD p. 25, lines 13-15; Tr. 196, 333-34. A month later, in August, six of the 14 encoders, who were employed by Total, began to work for Twin so as to comply with certain WBE requirements. ALJD p. 25, lines 15-16; Tr. 196-201, 333-34, 357. Due to these admissions, the ALJ was easily able to conclude that, as of July 1, 2013, a majority of Total and Twin's encoders had been employed prior to Oxford/Worldwide taking over the T5 contract. ALJD p. 24, lines 24-32 and p. 25, lines 13-15; GC 1(o)(par. 9(c)) and GC 1(p)(par. IX(c)). She similarly found that there been "substantial continuity" since Total and Twin have been engaged in the business of providing encoder services at T5, with encoders performing the exact same job duties, utilizing the same software and equipment that they had used prior to Oxford/Worldwide taking over the contract. ALJD p. 25, lines 17-22; Tr. 201, 354-56. In fact, both Total and Twin freely admit that they have continued to provide encoder services, in basically unchanged form, for the same customer (CICA TEC) since Oxford took over the contract. GC 1(o)(par. 9(c)) and GC 1(p)(par. IX(c)).

Accordingly, it is clear that there is really no dispute that all the Respondent-Employers are successor employers to ABM. Respondents (including Local 504) now instead erroneously

argue that the bargaining unit is not an appropriate unit because it fails to include all of the employees who are employed by Oxford/Worldwide at other airports within the United States and who are covered by the Local 504 contract. But as the ALJ correctly pointed out, as a threshold matter, Respondents have failed to establish that the T-5 employees in this case are subject to the Railway Labor Act (or conversely, that any of Oxford/Worldwide's employees employed at other airports are covered by the Act) such that it would clearly be inappropriate to lump all of Oxford/Worldwide's employees into a nationwide unit. ALJD p. 25, line 39 to p. 26, line 2. In addition, the ALJ properly recognized that Respondents' argument must fail because:

> the [Board] has long found a single-facility unit to be presumptively appropriate and the party opposing it has a heavy burden to rebut such a presumption. See *Trane*, 339 NLRB 866 (2003); *Budget Rent-A-Car Systems*, 337 NLRB 884 (2002). The appropriateness of a single-facility unit is different in the context of successorship than in an initial representation hearing, especially in situations, like the instant case, where employees had historically been represented in a single-location unit. *Allways E. Transportation, Inc. & Int'l Bhd. of Teamsters, Local 445*, 365 NLRB No. 71, slip op. 5 (2017). To determine whether the presumption has been rebutted, the Board examines a number of community-of-interest factors: (1) central control over daily operations and labor relations, including the extent of local autonomy, (2) similarity of skills, functions, and working conditions, (3) degree of employee interchange, (4) distance between locations, and (5) bargaining history, if any." *Id*. at slip op. 4. See also, *J&L Plate*, 310 NLRB 429, 429 (1993).

ALJD p. 26, lines 4-15.

Here, as the ALJ found, Respondents throughout the three day trial neglected to present the evidence necessary to carry their heavy burden to rebut the presumption that a single-facility unit is appropriate. ALJD p. 26, lines 15-18. They now instead simply ignore the ALJ's well-reasoned conclusion that the Board has jurisdiction in this case and unconvincingly argue that Worldwide's bargaining history under the Railway Labor Act controls in this matter. ALJD p. 26, lines 15-18. Accordingly, it is clear that the ALJ properly concluded that all of the Respondent-Employers are indeed successors to ABM.

VI. THE ALJ PROPERLY CONCLUDED THAT ABOUT JULY 1, 2013, THE RESPONDENT-EMPLOYERS VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY: (1) FAILING TO RECOGNIZE AND BARGAIN WITH LOCAL 399; AND (2) UNILATERALLY CHANGING THE UNIT EMPLOYEES TERMS AND CONDITIONS OF EMPLOYMENT AFTER THEY FORFEITED THEIR RIGHT TO SET INITIAL TERMS AND CONDITIONS OF EMPLOYMENT (OXFORD/ WORLDWIDE'S EXCEPTIONS 76-77, 80, 82-85; TOTAL/TWIN'S EXCEPTIONS 39, 46-50, 40, 43; AND LOCAL 504'S EXCEPTIONS 3, 8, 25, 28).

It is well-established that when a new employer acquires a business, makes no change to its essential nature, and hires a bargaining unit workforce in which a majority of the employees were the predecessor's unit employees, the "successor" employer has a duty to recognize and bargain with the incumbent union. *Fall River*, 482 U.S. at 36-41 (1987); *Burns Security Services*, 406 U.S. at 278-281 (1972). In these circumstances, the successor employer is normally free to set the initial terms and conditions of employment for the incumbent employees. *Burns Security Services*, 406 U.S. at 294. A notable exception is when the successor employer makes it "perfectly clear" that it intends to retain virtually all of the predecessor employees. *Id.* In that instance, the successor has an obligation to consult with the bargaining representative before unilaterally changing the predecessor's terms and conditions of employment. *Id.*; *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975).

The Board's doctrine that a *Burns* successor loses its right to set initial terms when it engages in certain unfair labor practices in an attempt to avoid a bargaining obligation is an application of that principle. *Potter's Drug Enterprises, Inc.*, 233 NLRB 15, 20 (1977), enfd. 584 F.2d 980 (9th Cir. 1978) (table); *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981). The rationale for this rule is well-grounded in policy. The right to establish terms and conditions of employment conferred by *Burns* is based on the premise that the successor employer will recognize the representative of the affected unit employees and enter into good faith negotiations with their union about terms

and conditions of employment. An employer's discriminatory scheme to rid itself of a union clouds crucial indicia of whether it is a "perfectly clear" successor, making it impossible to determine whether announced changes in working conditions are for legitimate reasons or are part and parcel of its discriminatory scheme to avoid a bargaining obligation. See *Love's Barbeque Restaurant*, 245 NLRB at 82. Thus, where the employer's motivation behind any newly announced employment terms is called into question, the Board has resolved the ambiguity against the wrongdoer. Any alternative policy would be contrary to statutory policy and would confer *Burns* rights to establish initial terms on employers that have blocked the process by which the obligations and rights of such a successor are incurred. See *State Distributing Co.*, 282 NLRB 1048, 1049 (1987).

Similarly, in *Advanced Stretchforming*, the Board held that a successor violated Section 8(a)(5) by unilaterally altering terms and conditions of employment where the employer clearly communicated to employees at the time of successorship that they would not retain their union. *Advanced Stretchforming*, 323 NLRB 529, 530 (1997). See also *Eldorado, Inc.*, 335 NLRB 952, 952-53 (2001). As the Board explained in *Eldorado*, such a statement indicates an intent to discriminate to avoid a successor obligation. Requiring the employer to "forfeit" its right to set initial terms and conditions of employment is not punitive in those circumstances, but rather is consistent with the equitable principle that any uncertainty created by a respondent's own misconduct should be resolved against it. See *Eldorado, Inc.*, 335 NLRB at 953. Therefore, an *Advanced Stretchforming* remedy is appropriate where it is required to remedy the effects of an employer's unlawful scheme to avoid its bargaining obligation with the union.

In the instant case, the Respondent-Employers were successors to ABM for the reasons laid out in the ALJ's decision and the preceding section of this brief. The ALJ also properly

relied on undisputed record evidence to find that, on October 15, 2012 (after CICA TEC had awarded the T5 service contract to Oxford), Local 399 Business Representative McGinty called Cunningham (Worldwide's Vice-President of Labor Relations) and demanded that Oxford and Worldwide sit down and bargain a new contract with Local 399. ALJD p. 10, lines 7-8 and p. 26, lines 30-34; Tr. 56-57. It is likewise undisputed that Cunningham flatly refused to bargain with Local 399 and made it abundantly clear that any further demands to bargain would be futile by stating to McGinty that the unit employees' long-time collective-bargaining representative was "out of luck." ALJD p. 10, lines 8-10 and p. 26, lines 34-35; Tr. 57. Later that same day, Cunningham sent an email to McGinty to further underscore Oxford and Worldwide's refusal to bargain with Local 399 based on their (mistaken) belief that they were subject to the Railway Labor Act, such that the unit employees would be represented by Local 504. ALJD p. 26, lines 34-35; GC 4; Tr. 58-59. As the ALJ correctly found, Local 399 thereafter reaffirmed its request to bargain by filing charges against the Respondent-Employers in Case 13-CA-99518 as well as the instant case. See *Williams Enterprises*, 312 NLRB 937, 938–939 (1993), enfd. 50 F.3d 1280, 1286 (4th Cir. 1995); *Stanford Realty Associates*, 306 NLRB 1061, 1066 (1992); *Sterling Processing Corp*., 291 NLRB 208, 217 (1988). ALJD p. 26, lines 36-44. But Respondent-Employers, as joint employers, persisted in their steadfast refusal to bargain with Local 399.[29] Based on the foregoing, the ALJ properly concluded all the Respondent-Employers violated Section 8(a)(1) and (5) of the Act by their admitted refusal to recognize and bargain with the unit

[29] The ALJ also appropriately relied on well-established caselaw to conclude that even though Local 399's initial two demands to bargain (on October 15, 2012, and the charge filed in Case 13-CA-99518) were premature, the Board's "continuing demand" rule provides that "when a union has made a premature demand that has been rejected by the employer, this demand remains in force until the moment when the employer attains the 'substantial and representative complement.'" *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 52-53. ALJD p. 26, lines 37-44. Local 399's premature request to bargain, thus, remained in effect until Respondent–Employers hired a "substantial and representative complement" of unit employees and took over the T5 contract on July 1, 2013. Furthermore, as noted above, the Union also renewed its premature demands to bargain by filing the instant charge on October 30, 2013.

employees' exclusive collective-bargaining representative—Local 399. ALJD p. 26, line 44 to p. 27, line 6.

Contrary to Respondent-Employers contention, the ALJ also properly concluded that Respondent-Employers forfeited their right to set initial terms and conditions of employment by unlawfully telling unit employees that they would no longer be represented by Local 399 and would instead have to join Local 504 as a condition of employment. ALJD p. 28, lines 16-22. Indeed, mechanics Pernell Miller and Sheraney Ford both testified that, in about June 2013, Jensen required them to complete a Local 504 dues checkoff form as a condition of employment. When they explained to Jensen that they did not wish to be represented by Local 504 and initially refused to sign the form, he coerced them into signing it by telling him that they had to sign it if they wanted to work for Worldwide. Not surprisingly, during cross-examination, Jensen himself admitted that "from the get-go," he informed all the mechanics and dispatchers that they had to join Local 504 as a condition of employment. Tr. 549-50. In addition, these unlawful statements were not just confined to the mechanics and dispatchers, but were also made to the encoders. Lead Encoder Martin testified that, in late November 2013, Total's supervisors, Kelly (last name unknown) and Tracey Ann Coakley, required Total's encoders to sign Local 504 dues checkoff forms as a condition of employment. Carpenter (Twin's President) admitted that Twin likewise required all of its encoders to join Local 504 and sign dues checkoff forms as a condition of employment. Tr. 357. And if that were not enough, Total and Twin stipulated that, since about July 1, 2013, they conditioned employment on their respective encoders signing membership cards and dues checkoff forms for Local 504. J 4 (pp. 5, 7).

By admittedly stating to unit employees that they would no longer be represented by Local 399 and would instead have to join Local 504 and sign dues checkoff forms as a condition

of employment, all of the Respondent-Employers violated Section 8(a)(1) of the Act. *Advanced Stretchforming*, 323 NLRB at 529. ALJD p. 30, lines 14-16. More importantly, the ALJ properly concluded that these unlawful statements caused the Respondent-Employers to forfeit their right, as a *Burns* successor, to set initial terms and conditions of employment because they are of the type that "blatantly coerce employees in the exercise of their Section 7 right to bargain collectively *through a representative of their own choosing*." *Id*. at 530 (emphasis supplied). ALJD p. 28, lines 16-22. And while Respondent-Employers attempt to argue in their exceptions that *Advanced Stretchforming* and *Eldorado* are distinguishable since the successor employers in those cases stated to their employees that they would not have any union, such an argument should be rejected as it fails to recognize that:

> the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize *the affected unit employees' collective-bargaining representative* and enter into good-faith negotiations with *that union* about those terms and conditions.

Id. (emphasis supplied).

Finally, inasmuch as the Respondent-Employers forfeited their right to set initial terms and conditions of employment, the ALJ properly concluded that they further violated Section 8(a)(5) of the Act by admittedly applying the terms of the Local 504 contract to unit employees on about July 1, 2013. ALJD p. 28, lines 24-38. In fact, there is no dispute that, in so doing, Respondent-Employers unilaterally changed their unit employees' wages, benefits, and other terms and conditions, including the following:

- Reducing wages;
- Changing the job classifications of the mechanics;
- Changing the mechanics and dispatchers' pay schedule from weekly to bi-weekly;
- Changing shift schedules;
- Eliminating employee seniority;
- Eliminating 401(k) retirement plan and traditional pension benefits;
- Altering health insurance benefits and premiums;

- Reducing vacation leave, sick leave, and holidays;
- Changing overtime policies; and
- Eliminating Educational Training classes.

ALJD p. 28, lines 28-38.

Based on the foregoing, the ALJ properly concluded that Respondent-Employers violated Section 8(a)(1) and (5) of the Act by: (1) failing to recognize and bargain with Local 399; and (2) unilaterally changing unit employees terms and conditions of employment after the companies forfeited their right to set initial terms and conditions of employment.

VII. THE ALJ PROPERLY CONCLUDED THAT SINCE JUNE 2013, THE RESPONDENT-EMPLOYERS HAVE VIOLATED SECTIONS 8(a)(2) AND (3) OF THE ACT AND LOCAL 504 HAS LIKEWISE VIOLATED SECTIONS 8(B)(1)(A) AND (2) OF THE ACT. (OXFORD/WORLDWIDE'S EXCEPTIONS 78, 82-83; TOTAL/TWIN'S EXCEPTION 51; AND LOCAL 504'S EXCEPTIONS 3, 26-28).

It is well established Board law that an employer violates Section 8(a)(1) and (2) of the Act if it renders unlawful assistance to the formation of a union by its employees. *Duane Reade,* 338 NLRB 943 (2003). In determining whether an employer has rendered unlawful assistance, the Board will examine the totality of the employer's conduct to determine whether its support would tend to inhibit employees in their free choice regarding a bargaining representative or interfere with the representative's maintenance of an arms-length relationship with it. *Id*. In addition, an employer will be found to have violated Section 8(a)(1) and (2) of the Act by recognizing and entering into a collective-bargaining agreement with a union that does not represent a majority of its employees. *Ladies' Garment Workers (Bernard-Altman Texas Corp.) v. NLRB,* 366 U.S. 731 (1961). In the same vein, a union violates Section 8(b)(1)(A) when it accepts unlawful assistance and recognition at a time when it does not represent a majority of the employer's employees. *Id*. Finally, if an employer enters into a collective-bargaining agreement containing a union security clause with a union which has not been shown to have been validly

designated as the bargaining agent by a majority of its unit employees, the employer violates Section 8(a)(1), (2), and (3) of the Act, and the union, in turn, violates Section 8(b)(1)(A) and (2) of the Act. *Polyclinic Medical Center of Harrisburg*, 315 NLRB 1257 (1995).

In the instant case, as has already been described in the preceding section of this brief, all of the Respondent-Employers admittedly informed the unit employees that they would no longer be represented by Local 399 and would instead be required to join Local 504 and sign dues checkoff forms as a condition of employment. Not only did these statements violate Section 8(a)(1) of the Act and deprive the Respondent-Employer of their right to set initial terms and conditions of employment, but they also constituted unlawful assistance to Local 504 in violation of Section 8(a)(2) of the Act as the ALJ properly concluded. ALJD p. 29, lines 11-18. Shortly after having provided this unlawful assistance to Local 504, Respondent-Employers further violated Section 8(a)(2) of the Act by admittedly recognizing Local 504—at a time when it did not represent a majority of their respective employees—and entering into a contract with it. ALJD p. 29, lines 13-18. Because Article 27 of the Local 504 contract contained a union security clause, the Respondent-Employers also violated Section 8(a)(2) and (3) of the Act by conditioning employment on unit employees maintaining membership in Local 504. ALJD p. 29, lines 13-18. If that were not enough, Respondent-Employers thereafter provided additional unlawful assistance to Local 504 by deducting union dues from employees' paychecks and remitting them to Local 504 and thereby further violated Section 8(a)(2) of the Act. ALJD p. 29, lines 13-18.

The ALJ similarly concluded that Local 504 violated Section 8(b)(1)(A) of the Act by admittedly: (1) accepting these various forms of unlawful assistance and recognition from the Respondent-Employers and; and (2) entering into a contract with all of them at a time when it

did not represent an uncoerced majority of the unit employees. Local 504 also violated Section 8(b)(1)(A) and (2) by entering into a contract with Respondent-Employers containing a union security clause that conditioned employment on unit employees maintaining membership in Local 504. ALJD p. 29, lines 18-23.

Thus, the undisputed facts support the ALJ's conclusion that Respondent-Employers violated Section 8(a)(2) and (3) of the Act and that Local 504 violated Section 8(b)(1)(A) and (2) of the Act as described above.

VIII. CONCLUSION

Based on the foregoing, the ALJ properly concluded that the Respondent-Employers, as joint employers, are subject to the Board's jurisdiction and that they are *Burns* successors who forfeited their right to set initial terms and conditions of employment by unlawfully telling unit employees that they would no longer be represented by Local 399 and would instead have to join Local 504 and sign dues checkoff forms as a condition of employment. The ALJ also properly concluded that the Respondent-Employers all violated Section 8(a)(5) of the Act by admittedly applying the terms of the Local 504 contract to their respective unit employees, about July 1, 2013, and thereby unilaterally changing wages, benefits, and other terms and conditions of employment. In addition, the ALJ properly concluded that the Respondent-Employers violated Section 8(a)(2) of the Act by providing various forms of unlawful assistance to Local 504, recognizing Local 504 at a time when it did not represent a majority of their respective employees, and entering into a contract with it. All of them also violated Section 8(a)(2) and (3) of the Act because the Local 504 contract that they unlawfully entered into contained a union security clause that conditioned employment on unit employees maintaining membership in Local 504.

In the same way, the ALJ properly concluded that Local 504 violated Section 8(b)(1)(A) of the Act by admittedly accepting (1) unlawful assistance from the Respondent-Employers; and (2) recognition and then entering into a contract with all of them at a time when it did not represent an uncoerced majority of the unit employees. Local 504 further violated Section 8(b)(1)(A) and (2) by entering into a contract that contained a union security clause that conditioned employment on unit employees maintaining membership in Local 504.

Accordingly, the General Counsel respectfully requests that Respondent's Exceptions be rejected in their entirety.

Dated at Chicago, Illinois, this 26th day of July 2017.

Respectfully submitted,

/s/ J. Edward Castillo
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Counsel for the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge were electronically filed with the National Labor Relations Board on this 26th day of July 2017, and true and correct copies of the document have been served on the parties in the manner indicated below on the same date.

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